92-1879

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO

Petitioner

vs.

KOKOSING CONSTRUCTION CO., ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STARK COUNTY, OHIO, FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the National Labor Relations Act preempt those provisions of Ohio's prevailing wage law that require the State of Ohio to determine, for example, whether work on a public improvement should be characterized as pipefitting or plumbing work, or as general laborer's work, in order to determine the appropriate prevailing wage rate for that work?

2. Does the National Labor Relations Act preempt enforcement of Ohio's "separate bid" laws, as found in Sections 153.50, 153.51, and 153.52 of the Ohio Revised Code, if the statute on its face and/or as applied requires municipalities or other public entities to advertise for bids separately for each type of mechanical labor that is to be performed on a public improvement?

II

STATEMENT OF INTERESTED PARTIES

All interested parties, except the following, are listed in the caption of this case:

State of Ohio, Department of Industrial Relations

Office of the Ohio Attorney General

State of Ohio

Since 28 U.S.C. Section 2403(b) may be applicable, this Petition is being served upon the Attorney General for the State of Ohio.

The Petitioner is unaware of any parent or subsidiary companies of Kokosing Construction Co.

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PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

The Petitioner, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 94 (the "Pipefitters' Union," or the "Union"), the Plaintiff and Appellant in the proceedings below, respectfully prays that a writ of certiorari issue to review the judgments of the Ohio Supreme Court filed on February 10, 1993, and the Ohio Court of Appeals for the Fifth District, Stark County, Ohio, filed on September 28, 1992.

OPINIONS BELOW

The opinion and judgment entry of the Court of Appeals for the Fifth District, Stark County, Ohio, filed on

September 28, 1993, and that Court's denial on December 4, 1992, of the Pipefitters' request for reconsideration are reproduced in the accompanying Appendix. (App. 019, 042). The Ohio Supreme Court's order denying discretionary jurisdiction over the Pipefitters' appeal from the Fifth District Court of Appeal's judgment, which was filed on February 10, 1993, also is reproduced in the accompanying Appendix. (App. 043). References to pages of the accompanying Appendix will be cited as "(App. ___)"

JURISDICTION

The Judgment of the Ohio Supreme Court denying discretionary jurisdiction over this matter was filed on February 10, 1993. This petition, pursuant to

Rule 28.2 of the Rules of the Supreme Court of the United States, was filed within 90 days thereafter. The jurisdiction of this Court is founded on 28 U.S.C. Sections 1254 and 1257.

STATUTES INVOLVED

29 U.S.C. Section 158(b)(i)(D). This generally is referred to as the secondary boycott provisions of the National Labor Relations Act. This statute reads in pertinent part as follows:

> (b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents. . .
>
> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage

> in, a strike or a refusal in the course of his emloyment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .
>
> * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for emloyees performing such work. . ."

Chapter 4115 of the Ohio Revised Code, which generally sets forth Ohio's "prevailing wage" laws. The relevant

portions of this Ohio law are set forth in the Appendix.

Section 153.50, 153.51, and 153.52 of the Ohio Revised Code set forth Ohio's "separate bid" laws for bidding on public improvement projects. These laws read as follows:

Section 153.50

Separate bids for work and materials.

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement.

Section 153.51

Contract may not be awarded for entire work.

When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

Section 153.52

Each contract shall be for only one class of labor or material, exceptions.

The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment, or business, or for the furnishing of materials therefore, or both, shall be awarded by the officer, board, or other authority referred to in section 153.50 of the Revised Code, in its discretion, to the lowest responsive and responsible separate bidder therefor, in accordance with section 9.312 [9.31.2] of the

> Revised Code in the case of any officer, board, or other authority of the state or any public institution belonging thereto, and to the lowest and best separate bidder in the case of a county, township, municipal corporation, or school district, or any public institution belonging thereto, and shall be made directly with him or them in the manner and upon the terms, conditions, and limitations as to giving bond or bid guaranties as prescribed by law unless it is let as a whole, or to bidders for more than one kind of work or materials. Sections 153.50 to 153.52 of the Revised Code do not apply to the erection of buildings and other structures which cost less than ten thousand dollars, except as provided in sections 153.02 and 153.03 of the Revised Code.

I. STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW.

On November 13, 1990, Petitioner, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 94 (the

"Pipefitters" or the "Union"), commenced proceedings against the City of Canton, Ohio ("City"), and against Kokosing Construction Company ("Kokosing") alleging a violation of Ohio's prevailing wage laws on a public improvement undertaken by the City. This action was brought pursuant to Ohio Revised Code Chapter 4115.16 and was filed in the Court of Common Pleas for Stark County, Ohio.[1] Specifically, the

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[1]The Pipefitters in January, 1988, brought an action seeking an order from the Ohio Court of Claims against the Ohio Department of Industrial Relations (ODIR) for its failure to enforce the prevailing wage laws at the Project. ODIR had failed to act in writing on two (2) administrative complaints filed by the Pipefitters regarding the Project. The Pipefitters' action against ODIR was dismissed on jurisdictional grounds in part because the legal remedy provided in O.R.C. Section 4115.16 was available. See, Plumbers Local Union No. 94 v. Ohio Department of Industrial Relations, Case No. 88AP-1047, unreported (Franklin App. 1990) (App. 001).

Pipefitters claimed that Ohio's "prevailing wage" laws at the Canton Waste Water Treatment Project ("Project") were violated because Kokosing, with the City's approval, improperly underpaid prevailing wages for a certain class of work on the Project.[2] (R. 001). Subsequently, Kokosing filed a cross-claim against the City and, without objection, joined Laborers Local Union 1015 (the "Laborers") as a party.

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[2]Under O.R.C. Section 4115.16(B), if ODIR fails to act within sixty (60) days, an "interested party" may file a Complaint in court under that statute in order to have the court determine the prevailing wage issue. Upon filing, the ODIR Director "shall cease investigating or otherwise acting upon the [administrative] complaint" and the Court "shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under Sections 4115.03 to 4115.16 of the Revised Code."

On May 8, 1991, the Union filed a First Amended Complaint. (App. 046). In the amended pleadings, the Union added a claim that Ohio's "separate" bid laws, respectively set forth in Chapters 4115 and Sections 153.50, 153.51, and 153.52 of the Ohio Revised Code, were not being followed by the City. (App. 046). There were no substantive changes in the Pipefitters' prevailing wage claim.

As to its claim arising under O.R.C. Section 4115.16(B), the Pipefitters Union contended that it was an "interested party" under O.R.C. Section 4115.03(F)(3) or (4), and that, as such, it had standing to bring this action. Standing to bring this prevailing wage action has not been challenged. The Pipefitters sought injunctive and declaratory relief, including injunctive relief against the

non-party ODIR Director, as well as an order against Kokosing and/or the City to pay the appropriate prevailing wages to members of the Laborers Union who performed work on the Project.[3] The Pipefitters Union did not seek any pay, backpay, or the assignment of any particular work for its own members. (App. 056-58, 075-76).

As to the other claim, which was brought under O.R.C. Section 153.50, the Pipefitters Union sought injunctive relief to insure that the City, in the future, complied with the "separate bid" requirements of the statute. (App. 057).

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[3] O.R.C. Section 4115.16(B) specifically prohibited the Pipefitters from naming the ODIR Director as a party. It permits the trial court to order the non-party Director to "take such action as will prevent further violation" of the prevailing wage law. See, O.R.C. Section 4115.16(B).

In its entirety, O.R.C. Section 153.50 provides that:

> "An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement."

(emphasis added).

The Pipefitters filed a motion for partial summary judgment on the issue of liability, while the City and Kokosing filed motions for summary judgment. On December 30, 1991, the trial court

granted summary judgment in favor of Kokosing Construction Company, the City of Canton, and Laborers' Local Union 1015, and denied the Pipefitters' motion for partial summary judgment. (App. 008). The trial court found, without citation to any authority, that the prevailing wage claim was a work jurisdiction issue and, therefore, preempted by the National Labor Relations Act ("NLRA"). The court also refused to consider the "separate bid" claims raised under Section 153.50, though not on preemption grounds. (App. 009). The Pipefitters timely appealed the trial court's judgment. Timely assignments of error were filed by the Petitioner which preserved the constitutional preemption issues. (App. 015).

On September 28, 1992, in a 2-1 decision, the Ohio Court of Appeals, Fifth District, for Stark County, Ohio affirmed the trial court's judgment. That Court held that the application of Ohio's "prevailing wage" law was preempted by the NLRA, since the State courts lacked jurisdiction to determine whether the work performed was plumbing or general labor work. While the trial court had not relied on preemption grounds for dismissing the second claim, that Court also held that Ohio's "separate bid" laws were preempted by the NLRA. In a well-reasoned dissent, Judge Hoffman disagreed. (App. 018, 032). These radical conclusions were based solely on the Court's incorrect assumption that the Pipefitters' Union was attempting to have the completed work

assigned to its own members. (App. 024-25). Not only was there no evidence in the summary judgment proceedings to support this conclusion -- a conclusion that is important to the preemption findings -- the evidence was to the contrary. (App. 075-76).

On October 8, 1992, pursuant to Ohio Appellate Rule 26 and Rule III of the Rules of Practice of the Supreme Court of Ohio, the Pipefitters timely filed an Application for Reconsideration with the Court of Appeals as well as a request to have the matter certified as a conflict with another state court decision to the Ohio Supreme Court. The Pipefitters argued that Ohio's "prevailing wage" and "separate bid" laws are not preempted by the NLRA and that this was not a "work jurisdiction" dispute, showing that they

specifically had disclaimed any attempt to obtain this work through the "prevailing wage" or "separate bid" proceedings.

On October 28, 1992, the Pipefitters timely filed a notice of appeal with the Ohio Court of Appeals. On November 3, 1992, the Ohio Court of Appeals certified this case to the Ohio Supreme Court as being in conflict with Donahue v. Cardinal Construction Co., 11 Ohio App. 3d 204 (Wayne App. 1983), but subsequently denied the Application for Reconsideration. (App. 037, 042). The Pipefitters then timely submitted this certification to the Ohio Supreme Court. (App. 039). The status of the appeal on the "certification of conflict" remains pending before the Ohio Supreme Court. That case has been designated as Ohio

Supreme Court Case No. 92-2443 and it is not clear that the Ohio Supreme Court can or will reach the preemption questions.

On or about November 25, 1992, the Pipefitters, as a protective measure, submitted a Memorandum in Support of Jurisdiction pursuant to Rule I, Section 4 of the Rules of Practice of the Ohio Supreme Court in an effort to have that Court accept discretionary jurisdiction over the constitutional/preemption questions in this case in the event that the City or Kokosing were successful in establishing that jurisdiction on the preemption questions based on the "conflict certification" was inappropriate. On February 10, 1993, the Ohio Supreme Court denied discretionary jurisdiction. (App. 043). That case has been designated as Ohio Supreme Court

Case No. 92-2375. This Petition is addressed to Case No. 92-2375 since that is the case that clearly raises the substantial constitutional and preemption questions as to whether Ohio's prevailing wage and separate bid laws may be constitutionally enforced under the facts of this case or similar facts, or whether such enforcement is preempted by the NLRA.

B. STATEMENT OF THE FACTS

On or about March 30, 1987, the City placed a newspaper advertisement seeking bids for a General Construction Contract for work at the Canton Waste Water Treatment Plant project (the "Project"). The Pipefitters contend that the advertisement for this General Construction Contract, with an estimated

construction cost of approximately $3,418,000.00, improperly included a substantial amount of plumbing and pipefitting work, i.e., a type of "mechanical" work described in O.R.C. Section 153.50, that should have been advertised so as to elicit bids separate from the General Construction Contract bid. The General Construction Contract, which was awarded to Kokosing without the City complying with O.R.C. Sections 153.50, 153.51, or 153.52, included the installation of new aeration compressors, air filters, a diffuser system, piping, valves, dissolved oxygen process, air meters, materials handling equipment, and other appurtenant work. The Pipefitters previously had performed this type of work in Stark County. There was no evidence, however, that the Laborers had

performed this type of work in Stark County. (App. 060-63, 076, 079-85).

Despite the Pipefitters' contention that the City improperly advertised for bids on this Project, the City, which did not deny non-compliance, still has not changed its bidding procedures for future advertisements.

One of the unsuccessful contractors who bid on the General Construction Contract was a local Canton mechanical contractor, Soehnlen Piping Company, a signatory to a Pipefitters' labor contract. Certain work within the advertised bid for the General Construction Contract is considered within the industry as both "plumbing and pipefitting" work and as separate and distinct "mechanical" labor. (App. 060-63). If the City had advertised for

a separate bid for this "mechanical" plumbing and pipefitting work as required by O.R.C. Section 153.50, Soehnlen, which was required to submit an over-all bid for all of the general construction work, would have submitted a separate bid for the "mechanical" plumbing and pipefitting work. Significantly, as a speciality "mechanical" contractor, Soehnlen would have underbid Kokosing, a general contractor, on these "mechanical" items, even utilizing the higher Pipefitters' wage and benefit rates. (App. 066-68).

The record reveals that the City did not find any qualitative difference between the Kokosing and the Soehnlen bids. Instead, the City made its decision based exclusively on the fact that Kokosing underbid Soehnlen on the entire General Construction Contract. It

did not take into account Soehnlen's underbidding of Kokosing on the specific "mechanical" work. Other than its contention that it was not required to comply with the statute, the City could give no specific reason why the "mechanical" labor was not bid separately.

Kokosing, which was granted and performed the General Construction Contract, primarily used employees from outside the Canton area, who were members of Laborers Local 1015, to perform this mechanical pipefitting work. Unlike the Laborers, the Pipefitters already had performed this type of work on waste water treatment plants elsewhere in Stark County, e.g., in Massillon, Alliance, Orrville, and Navarre, Ohio. Such work is included within the work-jurisdiction

clauses of the Pipefitters' collective bargaining contracts for the Canton area. (App. 079-81). No probative evidence was submitted by Kokosing, the City, or the Laborers to establish that the Laborers and/or Kokosing had performed this type of work within Stark County as of the time that the bids were let for the Project, or prior to that time. Under O.R.C. Section 4115.05, prevailing wages are to be determined for the "locality" based on the same type of work being performed under union contracts in that locality. The term "locality" is defined as the County where the Project is to be performed. See, O.R.C. Section 4115.03(D).

Significantly, after the bids were let, Soehnlen made an offer to perform the "mechanical" work for Kokosing using

local labor at a lower cost to the City. However, Kokosing refused, thereby, resulting in higher construction costs for the City, as well as a loss of higher-paying jobs for local labor! (App. 068).

The applicable statute setting forth how prevailing wages are to be determined is O.R.C. Section 4115.05. In part, that statute provides:

> "The prevailing rate of wages to be paid for a legal day's work. . . to laborers, workmen, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto."

(emphasis added). In this case, the only collective bargaining contract in the Record that was in force at the time that this Project was commenced is the Pipefitters' Agreement.

The above-quoted statute mandates that "prevailing wage" rates be determined by reviewing the collective bargaining agreements or understandings between employers and unions that were "in force," as of the date of the public works contract, for the same trade in the "locality" where the public work is to be performed. Only the Pipefitters performed this type of work in Stark County under a labor agreement in force during the relevant time period. Thus, there could be no "work jurisdiction" issue to decide and, therefore, no preemption of this claim!

It is undisputed that the combined wage and fringe benefit rates in the Pipefitter's contracts in the Stark County "locality" were approximately three dollars ($3.00) per hour higher than the parallel wage and fringe benefit rates that Kokosing actually paid to its employees, the Laborers, who actually did the pipefitting and plumbing work at the Project. Thus, the contractual wages/benefits paid by Kokosing were more than three dollars ($3.00) per hour less than the appropriate prevailing wage, i.e., the wage established by the Pipefitters' standard area labor agreement! Clearly, Soehnlen Piping, the Pipefitter's contractor, and its employees were disadvantaged during the bidding process since Kokosing's estimated bid was based on sub-prevailing

wages, while Soehnlen correctly utilized the correct prevailing wage rates -- its own rate -- when making its bids.

ODIR never conducted an investigation of the Pipefitters' administrative complaints, nor did it seek information from the Pipefitters regarding their performance of this type of work within Stark County.

At most, ODIR informally accepted Kokosing's diversionary tactic that this was a "work juris- dictional" dispute and, then, ODIR took a "hands off" attitude. This "hands off" attitude, however, resulted in ODIR never appropriately investigating the matter or determining whether the Pipefitter's wage rates or the Laborer's wage rates were the correct "prevailing" rates for work on the Project. This is the essence of the Pipefitter's Complaint.

Through this proceeding, the Pipefitters are not, have not, and were not attempting to obtain work on the Project for themselves. Instead, the Pipefitters' Union -- as an "interested part" -- was attempting to enforce Ohio's prevailing wage and separate bid laws and to insure that its signatory contractors and its members are not placed at an unfair competitive disadvantage during the public contract bidding process when they comply with Ohio law but companies, like Kokosing, do not.

Since the remedies sought by the Pipefitters Union never included having the work awarded or assigned to its own members and never included an effort to obtain back pay for its own members, there was not and could not be a work jurisdiction issue that would preempt

enforcement of these state statutes by the Ohio courts. Even if, assuming arguendo, the Pipefitters had multiple motives for pursuing this action, with one of those motives being the legitimate and appropriate enforcement of Ohio's laws, then their case was not and should not be preempted by the NLRA.

III. LAW AND ARGUMENT

OHIO'S PREVAILING WAGE AND SEPARATE BID STATUTES ARE VALID EXERCISES OF LEGISLATIVE AUTHORITY AND ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

A. The Prevailing Wage Statute On Its Face, Or As Applied, Is Not Preempted.

The Pipefitters' arguments are straightforward. The Pipefitters submit that, when any employee (whether non-union, a Pipefitter, or a Laborer) on

a "prevailing wage" job performs the work of a particular trade or craft -- such as pipefitting or plumbing work -- then that employee should be paid the "prevailing wage" rate when he or she does that type of work. The "prevailing wage" determination should be based upon collective bargaining agreements covering that type of work in the county regardless of whether union or non-union employees, actually perform the work.

In this case, there is no factual dispute that the Pipefitters' have performed the same type of "mechanical" work, including work on other waste water treatment plants, within the Canton and Stark County areas during relevant times. Until they were assigned the work on this Project, there is no evidence in the Record that employees of Kokosing, which

is headquartered outside of Stark County in Fredericksburg, Ohio, or the Laborers, ever performed the same type of work at waste water treatment plants in Stark County, even though they may have performed such work elsewhere in Ohio.[4]

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[4]Nevertheless, even if the Laborers had performed such work in Stark County, the Pipefitters' higher wage/fringe benefit rates should be paid regardless of which union (or non-union) employees actually performed the work. Since the purpose of federal and state prevailing wage laws is to prevent the under-cutting of prevailing wages by non-union or union contractors, the highest prevailing rates for the same type of work in the area should be paid, which in this case would be the rates set forth in the Pipefitters' contract, not the Laborer's (subsequent) agreement. Cf., Andersen Construction Co. v. City of Topeka, 228 Kan. 73, 612 P.2d 595, syl. p. 4 (1980); International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co., 36 Ohio St.3d 74, 79 (1988) (Locher, J., dissent). Otherwise, a "sham" or "Company" union easily could be utilized to circumvent the Ohio statute.

Furthermore, since neither the ODIR, nor the courts below, had to determine which of the employee groups should have been awarded the plumbing and pipefitting work, the matter is not preempted. The NLRB only has authority to determine which employees should perform certain work, not what they should be paid. H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). On the other hand, in order to resolve the "prevailing wage" issue under Ohio law, the State need only determine which employees, in fact, had performed this type of work within Stark County, not which employees should perform work on a specific project.

Kokosing's pre-emption argument, which the courts below accepted without citation to any authority, primarily was directed to the Pipefitters' claim

regarding Ohio's prevailing wage laws. However, this was a "straw man" argument. The Pipefitters consistently have contended in these proceedings that they were not attempting to obtain work for themselves, but only were attempting to insure that the employees -- who actually performed the work -- were paid the appropriate prevailing wage rates. See, "Plaintiff's Memorandum in Opposition to the Motions for Summary Judgment filed by City of Canton, Kokosing and the Laborers Union" filed December 13, 1991, at 3-9. (App. 075-76).

Moreover, a review of the Pipefitters' demand for relief in its Complaint and Amended Complaint (as well as all of its prior memoranda in this case) establishes that the Pipefitters were not seeking and have never sought

any back pay for their own members who could have performed the work, but who were not awarded this pipefitting work by Kokosing or by the City. (App. 056-58).

Even if the Pipefitters had sought to have ODIR award this work to themselves, only that portion of their claim might be subject to an unfair labor practice proceeding. Nevertheless, that does not mean that enforcement of the prevailing wage laws are preempted for those employees, i.e., the Laborers, who actually did the work. Those Laborers still have a statutory right to be paid the appropriate wages. The Pipefitters Union only has attempted legitimately to utilize the statutory appeal procedures set forth in O.R.C. Section 4115.16 to insure, as an "interested party," that the Laborers are paid correctly now and

in the future so that its own members (and the contractors who employ their members) are not unfairly treated by being out-bid by contractors who do not intend to properly comply with Ohio's prevailing wage and/or job bidding laws. If Kokosing and the City had followed both laws and the Pipefitters were not employed on the Project, so be it. Since this is a legitimate reason -- not prohibited by the NLRA -- for enforcing Ohio's laws, the enforcement of these laws is not preempted. Westmoreland Coal Co., 304 NLRB No. 66 (1991); Realty Maintenance Inc., 265 NLRB No. 173, n.14 (1982).

Once ODIR or the trial court determines that a particular craft has performed the work in question in the county, it must then determine what wage

rates apply. The trial court need not, and should not, consider which craft Kokosing preferred to use, what the relative skills of the Laborers and Pipefitters were, or many of the other factors relevant to a "work juridictional" dispute. Unlike the NLRB, which must engage in a case-by-case analysis and weigh various factors, the trial court need only find that the Pipefitters have performed this type of work on this Project and have performed this type of work <u>within this county</u> under a collective bargaining agreement. The trial court was not asked to issue <u>any</u> orders directing that the work be awarded to the Pipefitters, now or in the future. However, it should have issued an order declaring that the wage rates set by the Pipefitters' collective

bargaining agreement should have been paid regardless of which employees performed that work.[5]

Consequently, it is clear that the Pipefitters' prevailing wage action did not require a "work jurisdiction" determination. Thus, this claim is not pre-empted by the NLRA. The decision of the Ohio courts to the contrary are in conflict with Dillingham Construction,

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[5]Kokosing cited to In re Atomic Energy Commission, 19 WH Cases 489, 494 (Wage Appeals Board 1967), for the proposition that the federal prevailing wage rate laws are not and were not intended to be a vehicle for the settlement of jurisdictional disputes or the making of work assignments. The Pipefitters have not claimed otherwise. It has been Kokosing, not the Pipefitters, who has mis-characterized the Pipefitters' actual claims in these proceedings. Unlike a work jurisdictional dispute, the trial court need only have determined the amount of wages that should have been paid to the employees, not which employees should have performed the work.

Inc. v. County of Sonoma, 778 F.Supp. 1522 (N.D.Cal. 1991); General Electric Co. v. New York State Department of Labor, 936 F.2d 1448 (2d Cir. 1991); General Electric Co. v. New York State Department of Labor, 891 F.2d 25, 27-28 (2d Cir. 1989); Associated Builders and Contractors v. Curry, 797 F.Supp. 1528 (D.C.Cal. 1992).

B. The "Separate Bid" Statute On Its Face, Or As Applied, Is Not Preempted.

The City's advertisement for bids wrongfully included a significant amount of plumbing and pipefitting work (which constitutes a separate and distinct "mechanical" trade) within the General Construction Contract. Under O.R.C. Section 153.50, the City should have

advertised this "mechanical" work as a separate contract. If it had done so, Soehnlen would have submitted a lower bid on this speciality work than Kokosing even using the higher Pipefitters' wage rates.

While Kokosing suggested that the Section 153.50 claim was pre-empted by the NLRA, Kokosing did not offer any authority for this proposition. Nevertheless, the Court of Appeals, also with no explanation and no citation of authority, erroneously found both of these statutes, i.e., the "prevailing wage" statute and Section 153.50, to be pre-empted.

O.R.C. Section 153.50 establishes the procedure by which the City of Canton is required to advertise bids for public improvements. Nothing under the NLRA

ever was intended to regulate these types of statutes regarding the bidding procedures of a governmental unit of a State. Indeed, the NLRA does not govern governmental entities or the bidding procedures of a governmental unit. See, 29 U.S.C. Section 152(2) (the term "employer" specifically excludes States and their political subdivisions). Thus, the finding of the Court of Appeals that the Section 153.50 claim is pre-empted should not be permitted to stand.

As with the prevailing wage claim, since the Pipefitters had a legitimate reason to pursue their Section 153.50 claim, it is not preempted by the NLRA even if the Union also had a separate secondary motive. See, Westmoreland Coal, supra; Realty Maintenance, supra.

CONCLUSION

For the reasons and law stated above, the Pipefitters respectfully request that this Court accept jurisdiction over this appeal and grant the requested petition.

Respectfully submitted,

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